No. 01-772

IN THE

Supreme Court of the United States

CHARLES E. PAPPAS, M.D.,

Petitioner,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should deny *Certiorari* on Petitioner's first claim of error where he lacks standing to bring the issue before this Court; and, even if he had standing to assert the claim of error before this Court, there is no conflict among the circuits that requires review by this Court?

2. Whether the Court should deny *Certiorari* on Petitioner's second claim of error which involves only the application of the harmless error doctrine to well-settled issues of state law?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

. The Petitioner is Charles E. Pappas, M.D., the plaintiff before the District Court and appellant before the Circuit Court. Respondent is UNUM Life Insurance Company of America, the defendant before the District Court and appellee before the Circuit Court. UNUM Life Insurance Company of America is a wholly-owned subsidiary of UNUMProvident Corporation.

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I. COUNTERSTATEMENT OF THE CASE

A. Introduction

This case involves a dispute, arising under state law, between a physician (Dr. Pappas or "Pappas") and an insurer (UNUM Life Insurance Company of America or "UNUM") over disability insurance. As explained below, Pappas had a full opportunity to present his claims before the District Court and subsequently on appeal to the Third Circuit. Each time, however, Pappas' claims were found insufficient to require submission to a jury.

Pappas now asks this Court to review his state law claims under the pretext that his constitutional rights were somehow violated when the Court of Appeals issued an unpublished opinion. He further claims this Court should review the Court of Appeals' application of the harmless error doctrine to well-settled issues of state law.

Much like his state law claims at trial, all of which were dismissed on a Rule 50 motion at the close of plaintiff's evidence, Pappas' allegations of error to this Court are devoid of any legal merit and do not warrant discretionary review by this Court.

B. Proceedings before the District Court.

Pappas filed this action in the Court of Common Pleas of Philadelphia County, Pennsylvania, on May 30, 1997 alleging state law claims for alleged breach of contract, insurance "bad faith" under 42 Pa.C.S.A. §8371, and declaratory relief. UNUM removed the claim to the United States District Court for the Eastern District of Pennsylvania.

UNUM asserted a Counterclaim seeking a declaration that certain Cost of Living Adjustment (COLA) benefits were not due because of a policy exclusion, and claiming that Pappas was unjustly enriched by UNUM's mistaken payment of COLA benefits to which Pappas was not entitled.

As the Court of Appeals noted, there were disputes between Pappas and UNUM over his entitlement to benefits and their calculation. As a result of these disputes, UNUM twice offered to repurchase Pappas' disability policies as a means of settling the disputes between the parties. Pappas rejected both offers. Prior to trial, UNUM moved for *in limine* relief precluding the use, as evidence in the case, of the settlement negotiations. The District Court, citing Fed.R.Evid. 408, excluded the settlement negotiations as evidence of liability at trial.

After the close of Pappas' case, the District Court granted UNUM's motion under Fed.R.Civ.P. 50 for Judgment as a Matter of Law. The District Court granted the motion and dismissed Pappas' case because he failed to offer evidence upon which a jury could find, under the clear and convincing standard applicable to Pennsylvania bad faith claims, that UNUM had acted in bad faith. The District Court also dismissed the breach of contract and declaratory relief claims for lack of evidence.

After the close of UNUM's case in chief, the District Court held that (1) the exclusion riders rendered the COLA benefits inapplicable to Pappas' claim; (2) UNUM was entitled, under equitable principles of unjust enrichment, to restitution for past COLA payments in the amount of $110,701.55; and (3) UNUM was entitled to a declaratory

judgment relieving it from any obligation to provide future COLA benefits.

C. Proceedings before the Third Circuit.

Pappas appealed the judgment of the District Court to the United States Court of Appeals for the Third Circuit on December 18, 2000. Pappas alleged, among other things, that the District Court erred by excluding evidence of offers to repurchase the policies under Fed.R.Evid. 408 and by usurping the role of the jury in granting UNUM's Rule 50 motion.

The issues presented to the Third Circuit were extensively briefed by both parties, and then were argued before a panel of the Third Circuit. Thereafter, the Third Circuit issued a thorough memorandum opinion that examined -- and rejected -- Pappas' claims of error in great detail.

Of particular relevance here, the Third Circuit carefully considered Pappas' claim that the District Court's ruling under Rule 50 was flawed because UNUM's offer to repurchase the policies was evidence of bad faith. Specifically, the Third Circuit determined that the District Court erred in excluding the offers to repurchase under Fed.R.Evid. 408, as they were being offered not as evidence of liability but, rather, as evidence of UNUM's alleged bad faith.

However, the Third Circuit determined that the exclusion of the evidence was harmless error because, even if presented to the jury, there was still insufficient evidence upon which a reasonable jury could determine, by clear and convincing evidence, that UNUM acted in bad faith:

> While, as discussed above, settlement attempts by an insurer may be evidence of bad faith, Pappas' allegations, even when combined with all the other evidence in the case, would not allow a jury to conclude that he demonstrated bad faith by clear and convincing evidence. UNUM had a legitimate dispute with Pappas over the amounts due under his policies, one to which he contributed by his reluctance to comply with UNUM's investigation. Accordingly, it is not reasonable to infer that it acted in bad faith in attempting to settle the dispute. With nothing else to support his claim, and even taking into account UNUM's attempt to repurchase its policies, Pappas' evidence would not permit a jury to conclude that Pappas clearly and convincingly established that UNUM acted in bad faith.

See, *Petition for Writ of* Certiorari, pp. 13a – 14a.

In short, the Court of Appeals held that the Rule 50 motion was properly granted because, even with the additional evidence, Pappas failed to meet his burden as a matter of law. The Third Circuit then rejected the remaining allegations of error dealing with COLA benefits and whether UNUM's equitable claim for unjust enrichment was properly tried as a bench trial because, after careful review, they were found to be without merit.

D. The Present Petition.

Pappas seeks *Certiorari* before this Court on two issues. First, he alleges that the Third Circuit violated his "litigant's rights" under Article III of the United States Constitution because it chose not to publish its memorandum decision in this matter. Therefore, Pappas seeks to have this Court grant *Certiorari* to "provide guidance to the Court of Appeals as to the Constitutionality and Propriety of non-precedential opinions." *See, Petition for Writ of* Certiorari, p. 8. Pappas implies, incorrectly, that this Court should resolve this issue because of substantial controversy among the lower courts. But, as explained below, while local appellate rules vary as to the precedential effect of unpublished opinions, there is no split among the Circuit Courts on the question of whether it is constitutionally permissible to issue an unpublished and nonprecedential opinion.

Quite apart from the question of whether unpublished opinions are unlawful, Pappas has not alleged any tangible impact or "harm" from the publication of an unpublished opinion that would confer standing. For example, he has not identified any unpublished case he was prohibited from relying upon in the proceedings before the lower courts. Nor has he alleged that he has been unable to use the Third Circuit's unpublished opinion in any other lawsuit to support his position. And, of course, the unpublished opinion is binding on the parties; therefore, Pappas has not (and cannot) claim he has been deprived access to the federal courts.

Rather than address the lack of any injury in fact, Pappas resorts to *ad hominem* attacks on the Third Circuit panel, implying that the judges did not devote the requisite

time and analysis to his case because its decision was unpublished. Interestingly, of the issues raised below, Pappas only seeks review of those determinations that were exhaustively analyzed by the Third Circuit.

Pappas also seeks to have this Court grant *Certiorari* because he claims the Third Circuit erred in finding that the offers to repurchase the policies should have been admitted but then concluding that their exclusion was harmless error. Pappas claims the issue of bad faith should have gone to the jury under the Seventh Amendment of the United States Constitution. However, there is no Seventh Amendment right to a jury trial on meritless claims and there is nothing unconstitutional about dismissing meritless claims.

II. REASONS FOR DENYING THE WRIT OF *CERTIORARI*

This case presents no unsettled or controversial legal issues and the resolution of Pappas' claims will have no impact on the public at large. Instead, Pappas attempts to bootstrap a misguided Constitutional argument about the use of unpublished decisions to obtain review of state law claims that two courts have already found insufficient for submission to a jury in hopes of convincing this Court to accept review.

However, Pappas lacks standing to bring his challenge to the propriety of unpublished memorandum decisions. Additionally, there is no conflict among the Circuits that would warrant *Certiorari*.

Finally, Pappas' claims regarding the Rule 50 motion presents no issue warranting *Certiorari*. Instead, his claims involve only the application of the harmless error doctrine to well-settled principles of state law.

In sum, as described below, this case presents no reason, compelling or otherwise, for review by this Court. *Certiorari* should therefore be denied. Sup. Ct. R. 10.

A. Pappas lacks standing to assert a Constitutional challenge to the propriety of unpublished opinions.

Pappas claims the Third Circuit violated his Constitutional rights under Article III by issuing an unpublished decision. Pappas essentially asserts that all decisions of the Federal courts must be published and

afforded precedential status.[1] But Pappas lacks standing to challenge the propriety of unpublished opinions.

Article III's standing requirements are rooted in one of the hallmarks of our nation's system of governance: the constitutional separation of powers. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of the federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997), *citing, Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). The requirement of standing is an "irreducible constitutional minimum" for a party seeking to invoke federal jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1991).

Pappas bears the burden of proving that he has standing. *Id., citing, FW/PBS, Inc. V. Dallas*, 493 U.S. 215, 231 (1990). His burden is not merely one of proper pleading. Because standing is "an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561.

In order to meet this burden, the Pappas must satisfy each of the following three elements of standing: (1) "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) causation of the injury

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[1] Taken to its logical conclusion, Pappas' position would prohibit any appellate court from rendering any decision (such as a summary affirmance or denial of a Petition for Writ of *Certiorari*) without a published opinion.

by the defendant's complained of conduct; and (3) a likelihood (rather than speculation) that the requested relief will redress the injury. *Lujan*, 504 U.S. at 560-61. Pappas, however, cannot satisfy any of these elements.

As to the first prong, there exists no legally protectable interest to a published opinion deciding the merits of any appeal. In fact, courts of appeal throughout the United States issue unpublished opinions every day that resolve the disputes as to the particular parties and issues in that case. The alleged right to a published opinion is merely hypothetical, and Pappas has not directed, and cannot direct, this Court to any authority holding otherwise. Moreover, Pappas has not been denied access to the Courts in any sense; instead, he was given a full opportunity to be heard and received a timely and binding resolution of his dispute, a fact not altered by the lack of a published opinion.

Second, Pappas has not, and cannot, offer any evidence of an actual injury caused by either the Third Circuit's issuance of an unpublished decision or by the general practice of courts issuing unpublished decisions. He has not identified any unpublished opinion he was prohibited from citing before the District Court or the Circuit Court. Nor has he alleged that he has been prohibited from using the Third Circuit's decision in this case as authority in some other litigation.

As a substitute for an actual injury, Pappas offers the remarkable assertion that because the Third Circuit's decision was unpublished, he is allegedly left "in the untenable position of not knowing whether the Court of Appeals in fact gave his case the time and effort it required, and whether the Court truly considered the validity of the District Court's opinion." *Petition for Writ of* Certiorari,

p. 11. Thus, he claims he has "diminished confidence" in whether he has been given his "day in court." *Petition for Writ of* Certiorari, p. 18. Pappas' *ad hominem* attacks on the Third Circuit panel are unfounded.

Preliminarily, there is absolutely no evidence that the Third Circuit did not carefully review this matter. To the contrary, the arguments were fully briefed and oral argument was held. Then the Court issued a thorough opinion that carefully reviewed the applicable law and facts. Notably, the Third Circuit did not "rubber stamp" the District Court's opinion; instead, it reversed the District Court's ruling under Fed. R. Evid. 408 but concluded the error was harmless.

Moreover, such speculation about whether the judges of the Third Circuit consider cases carefully is no substitute for Article III's irreducible constitutional requirement that the threatened harm be an actual or imminent injury. *Lujan*, 504 U.S. at 564. Thus, Pappas improperly asks the Court to grant *Certiorari* where there is no evidence of any injury. *Id.*

Finally, Pappas must demonstrate that a decision by this Court would adequately redress his grievance regarding the unpublished opinion. Here, an order from this Court requiring the Third Circuit to publish its opinion would not alter Pappas' substantive position at all; therefore, the third prong for standing is not satisfied.

At least one court has already rejected a challenge to the use of unpublished decisions on standing grounds. In *Schmier v. United States Court of Appeals for the Ninth Circuit*, 136 F.Supp.2d 1048, 1052 (N.D.Cal. 2001), the Northern District of California held that the plaintiff lacked

standing to assert a claim against the Ninth Circuit for declaratory relief declaring that the Circuit's rule, prohibiting citation to unpublished dispositions, was unconstitutional. The court held:

> As previously noted, however, Schmier does not assert that he has attempted to cite an unpublished disposition in this action in violation of Rule 36-3. Nor does Schmier suggest that he attempted to no avail to have an unpublished disposition published under Rule 36-4. Indeed, Schmier's opposition to defendants' motion to dismiss did not even contain citations to any unpublished opinions.
>
> As a recent case in the Eighth Circuit upon which Schmier places great weight makes clear, in order for a litigant to have standing to challenge these type of circuit rules, the party must cite an unpublished decision in an actual case.

Id. (citing *Anastasoff v. United States*, 223 F.3d 898, *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (*Anastasoff I*) and *Anastasoff v. United States*, 235 F.3d 1054 (8th Cir. 2000) (*Anastasoff II*)).

B. There is no conflict among the Circuits that would compel this Court to accept review.

Pappas suggests that the Court should grant *Certiorari* because the use of unpublished decisions is "the subject of much debate" among the legal community.

Petition for Writ of Certiorari, p. 9 But there is no split among the circuits and any "debate" is, at this point, merely academic.

The shortcomings of Pappas' position is perhaps best revealed by his reliance on the Eighth Circuit's opinion in *Anastasoff I* (*Petition for Writ of* Certiorari, pp. 15-16), in which Circuit Judge Arnold held, as a matter of law, that rules precluding citation to unpublished opinions violated Article III of the Constitution. 223 F.3d at 905. But Pappas glosses over the subsequent appellate history in which Anastasoff petitioned for a rehearing *en banc*, which was granted by the Eighth Circuit. Before the court heard the matter *en banc*, the parties reached a settlement. *Anastasoff II*, 235 F.3d at 1055. The Circuit, *en banc*, through Circuit Judge Arnold, issued the *Anastasoff II* decision on December 18, 2000, approximately four months after the panel opinion was published. In *Anastasoff II*, the Circuit, *en banc*, vacated the panel decision as moot, but also took an extra step and concluded:

> Here, the case having become moot, the appropriate and customary treatment is to vacate our previous opinion and judgment, remand to the District Court, and direct that Court to vacate its judgment as moot. We now take exactly that action. **The constitutionality of that portion of Rule 28A(i) which says that unpublished opinions have no precedential effect remains an open question in this Circuit.**

Id. at 1056 (emphasis added). Therefore, the Eighth Circuit vacated the panel opinion and expressly noted that, as a result, the Eighth Circuit has not ruled on the

constitutionality of the precedential value of unpublished decisions.[2]

Pappas glosses over the Eighth Circuit's vacation of its own opinion and moves on to analyze the Ninth Circuit's opinion in *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001), leaving the impression that the *Hart* decision evidences a split of authority among the Circuits when put next to *Anastasoff I*. In fact, given *Anastasoff II*, there is no split between the Eighth and Ninth Circuits on this issue.

Hart, is, in fact, instructive here, because the Court addressed and rejected many of the alleged concerns Pappas raises. The *Hart* court cogently stated:

> That a case is decided without a precedential opinion does not mean it is not fully

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[2] Many Federal courts have recognized the Eighth Circuit's abrogation of its holding in *Anastasoff I*, including the Eighth Circuit itself. *See, e.g., Andrews v. Neer*, 253 F.3d 1052, 1057 n. 3 (8th Cir. 2001)(reasserting vacation of *Anastasoff I* and stating that Rule 28A(i) remains in full force and effect); *Lederman v. Cragun's Pine Beach Resort*, 247 F.3d 812, 816 n.3 (8th Cir. 2001)(same); *United States v. McClean*, No. 00-2973 2001 U.S.App. LEXIS 21629, *4 n.2 (8th Cir. Oct. 10, 2001)(same); *United States v. Lopez-Pastrana*, 244 F.3d 1025, 1036 n.5 (9th Cir. 2001)(Graber, C.J., dissent); *Holland v. Horn*, 150 F.Supp.2d 706, 720 n.8 (E.D.Pa. 2001)(recognizing Eighth Circuit's abrogation of *Anastasoff I* as well as absence of any Third Circuit precedent on issue of unpublished decisions); *Schmier v. United States Court of Appeals for the Ninth Circuit*, 136 F.Supp.2d 1048, 1052 (N.D.Cal. 2001); *Lewis v. Rosenfeld*, 145 F.Supp.2d 341, 345 n.8 (S.D.NY 2001); *Newell v. Rolling Hills Apartments*, 134 F.Supp.2d 1026, 1040-1041 (N.D.Iowa 2001).

> considered, or that the disposition does not reflect a reasoned analysis of the issues presented. What it does mean is that the disposition is not written in a way that will be fully intelligible to those unfamiliar with the case, and the rule of law is not announced in a way that makes it suitable for governing future cases. As the Federal Judicial Center recognized, "the judicial time and effort essential for the development of an opinion to be published for posterity and widely distributed is necessarily greater than that sufficient to enable the judge to provide a statement so that the parties can understand the reasons for the decision." Federal Judicial Center, Standards for Publication of Judicial Opinions 3 (1973). An unpublished disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision.

Id. at 1177-1178.

In short, despite Pappas' claim that there is a "debate" over this issue, there is no split among the Circuits because the Eighth Circuit vacated its own opinion in *Anastasoff I*, thereby leaving open the question of constitutionality of rules regarding precedential status of unpublished dispositions. Accordingly, there is no split in the Circuits, and review should be denied. Sup. Ct. R. 10(a).

C. The Third Circuit Did Not Ignore Pennsylvania law on unjust enrichment.

Pappas asserts in footnote 4 of his Petition that the alleged concerns about unpublished decisions are "particularly apt" here because, he claims, the Third Circuit ruled in contravention of Pennsylvania law on the issue of unjust enrichment. Contrary to Pappas' position, it is well settled that "[u]nder Pennsylvania law, an insurer may recover payments to the Insured under a mistake of fact or as a result of fraud or misrepresentation." *Van Riper v. The Equitable Life Assur. Soc.*, 561 F. Supp. 26, 33 (E.D. Pa. 1982), *aff'd*, 707 F. 2d 1397 (3d Cir. 1983) (emphasis added); *cf. Foster v. Federal Reserve Bank of Philadelphia*, 113 F. 2d 326, 327-28 (3d Cir. 1940). The presence of a contract between the parties does not defeat an unjust enrichment claim because there is no contractual provision in the policies requiring Pappas to repay the mistakenly paid COLA benefits; thus, UNUM had no adequate contract remedy available at law. Therefore, the Third Circuit ruled in accordance with Pennsylvania law.

D. The Third Circuit's harmless error ruling is not appropriately the subject of review by this Court.

Pappas' second allegation of error seeks to have this Court eviscerate Fed.R.Civ.P. 50 and to require that all claims, whether meritorious or meritless, be sent to the jury. Pappas ignores the fact that there is no Seventh Amendment right to a jury trial on a meritless claim. The District Court has discretion to determine, as a matter of law, that a plaintiff has failed to meet his burden of proof and therefore terminate plaintiff's case at the close of his evidence.

In fact, there are several methods under the Federal Rules of Civil Procedure by which the District Court may take a case away from the jury.[3] It follows that, under Fed.R.Civ.P. 50(a), the District Court may dismiss an action after plaintiff's case-in-chief if it determines, as a matter of law, that the plaintiff has failed to adduce sufficient evidence upon which a reasonable jury could return a verdict in its favor.

Significantly, the facts concerning the settlement negotiations were not in dispute and were presented to the District Court in briefs filed by both parties on UNUM's motion *in limine*. The Court of Appeals ruled, as a matter

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[3] For example, Fed.R.Civ.P. 12(b)(6) provides that the District Court may dismiss an action for failure to state a claim upon which relief may be granted if it determines, as a matter of law, that the allegations in the complaint do not support the *prima facie* elements of the cause of action pleaded. Rule 56(c), Fed.R.Civ.P., permits the District Court to dismiss part or all of plaintiff's case before trial if it determines, viewing the evidence in the light most favorable to the plaintiff, that plaintiff can not prevail on its claim as a matter of law.

of law, that even if those facts were presented at trial (rather than in a motion *in limine*), Pappas' bad faith claim did not require submission to a jury.

In short, all of these issues are matters of law, not fact. *See,* Fed.R.Civ.P. 50(a). As they are issues of law, they are properly decided by a judge and not the jury. On appeal, the Third Circuit exercises plenary review of conclusions of law. *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 215 F.3d 407, 409 (3d Cir. 2000)(setting forth scope of plenary review). Therefore, the Third Circuit had discretion to review the evidence in the same manner as did the District Court and determine whether, as a matter of law, Pappas had presented sufficient evidence upon which a reasonable jury could return a verdict in his favor. Because the Third Circuit applied a rule of law in finding harmless error, this Court should decline review. *See,* Sup. Ct. R. 10 ("A petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

As the Third Circuit determined that it was error to exclude evidence of offers to repurchase the policy, the issue then turned to whether such error was harmless. The Third Circuit reviewed the issue in the context of the Rule 50(a) motion. Therefore, this determination of harmless error was a legal question, not a factual one, and the Third Circuit was correct to find that the exclusion of the evidence was harmless. *See, West v. Philadelphia Elec. Co.*, 45 F.3d 744, 752 (3d Cir. 1995)(discussing harmless error).

There is nothing controversial or unusual about the harmless error doctrine. In fact it is set forth in Fed.R.Civ.P. 61 which provides in relevant part: "The court

at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Pappas asserts that the jury was the proper body to determine whether UNUM's conduct rose to the level of bad faith. Pappas even cites to *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 501 (1959), for the well-known maxim that the right to a jury trial is Constitutional. Pappas is correct that the right to a jury trial is protected by the Seventh Amendment. However, Fed.R.Civ.P. 50(a) grants the District Court discretion to determine if the evidence presented warrants deliberation by the jury.

In other words, the District Court performed a review of the evidence to determine if Pappas had met his burden of proof *as a matter of law*. The District Court found that he had not. The Third Circuit reviewed the exclusion of evidence and found that the exclusion of certain evidence was error. However, because the Third Circuit exercised plenary review, it then performed the same analysis as did the District Court under Fed.R.Civ.P. 50(a), and found that the exclusion of evidence was harmless error because, even if admitted at trial, it would not have had the effect of meeting the burden of proof by clear and convincing evidence. Accordingly, even had the erroneously excluded evidence been admitted at trial, Pappas' claims still would have failed as a matter of law.

III. CONCLUSION

This Court should deny Pappas' Petition for Writ of *Certiorari* because there are no compelling reasons presented in the Petition that trigger this Court's discretionary review. He has attempted to dress-up his claims in Constitutional clothing to no avail. Pappas lacks standing to assert any claim for violation of his Article III rights by the Third Circuit's decision to issue an unpublished disposition. Even if he has standing to assert a violation of his Article III rights, there is no split of authority among the Circuits warranting review. Instead, Pappas seeks to have this Court redraft the Third Circuit's Internal Operating Procedures in a vain attempt to argue the same position another time. Finally, Pappas' argument regarding harmless error is specious because it is clear that the District Court may, upon motion, dismiss a case at any of several procedural steps if the District Court concludes, as a matter of law, that plaintiff has failed to meet his burden of proof.

Accordingly, the Petition for Writ of *Certiorari* should be denied.

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